Supreme Court, U.S.
FILED

03 784 NOV 17 2003

OFFICE OF THE CLERK

No: _____

In The
Supreme Court of The United States

In the Interest of A.B., A Child.

Norean Hoots, L.S.W., of Cass County Social Services, and Monty Mertz, Guardian ad Litem, on behalf of A.B.,
Petitioners,

v.

K.B., F.B., and Turtle Mountain Band of Chippewa,
Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of The State of North Dakota

PETITION FOR WRIT OF CERTIORARI

SUSAN L. BAILEY
Assistant Cass County State's Attorney
Counsel of Record

CONSTANCE L. CLEVELAND
Assistant Cass County State's Attorney
Cass County Social Services
1010 - 2nd Avenue South
P.O. Box 3106
Fargo, ND 58108-3106
Tel: (701) 239-6797

JOINDER STATEMENT

Monty Mertz, Guardian ad Litem, on behalf of A.B., joins in the petition of Norean Hoots, L.S.W., of Cass County Social Services, pursuant to Rule 12.4 of the Rules of the Supreme Court of the United States.

Dated this 12th day of November, 2003.

MONTY G. MERTZ
Attorney at Law
1308 - 23rd Street South
P.O. Box 10396
Fargo, ND 58106-0396
Tel: (701) 293-7788

QUESTIONS PRESENTED FOR REVIEW

Introduction: This termination of parental rights case is before the Court on a threshold issue regarding jurisdiction and the appropriate review and application of the Indian Child Welfare Act (hereinafter ICWA). The matter is an appeal by Norean Hoots, L.S.W., of Cass County Social Services (hereinafter CCSS), of the North Dakota Supreme Court's decision of June 17, 2002, (petition for rehearing denied August 20, 2003) affirming the Juvenile Court's granting of Turtle Mountain Band of Chippewa's (hereinafter Tribe) motion to transfer jurisdiction from the state court to Tribal Court and motion to dismiss. The Juvenile Court decision of October 25, 2003, was a reversal of the Juvenile Referee's decision of October 8, 2002, denying the Tribe's motion and motion to dismiss. The North Dakota Supreme Court, inter alia, applied a mere rational standard of review to equal protection issue, ignored the substantive due process issue, and held that the present manner of application of ICWA to the minor child is not unconstitutional.

1. Whether AB, a citizen of the United States and of the State of North Dakota, and an Indian child as that phrase is defined under ICWA, is entitled to the protections of the Constitution of the United States of America and the Constitution of the State of North Dakota and thus entitled to due process and equal protection afforded other children under relevant federal and state laws concerning the protection of children and whether review of the application of ICWA to an individual Indian child is subject to strict scrutiny under both equal protection and substantive due process analyses, thus the means employed must be narrowly tailored to meet a compelling governmental interest especially where the matter involves government action vis

a vis an individual child rather than the government action vis a vis a tribe.

2. Whether the existing Indian family doctrine should be applied here to prevent unconstitutional application of ICWA to the facts of this case.

3. Whether under fair application of ICWA to the facts of this case the Tribe's motion to transfer jurisdiction should have been denied because (a) the mother's prior veto of the Tribe's initial motion to transfer jurisdiction barred subsequent motion to transfer jurisdiction, (b) the motion was untimely, (c) the Tribal Court is an inconvenient forum, and/or (d) the best interests of the child should have been considered by the State courts.

4. Whether the United States Congress exceeded its authority under the Indian Commerce Clause and violated the Tenth Amendment of the United States Constitution in enacting ICWA.

PARTIES TO PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties are listed on the cover.

Petitioner Norean Hoots, L.S.W., is not a corporate entity, nor is her employer Cass County Social Services.

Monty Mertz, Guardian ad Litem, on behalf of A.B., joining in the Petition, is not a corporate entity.

TABLE OF CONTENTS

Joinder Statement i

Questions Presented For Review ii

Parties to Proceeding and
Corporate Disclosure Statement iv

Table of Authorities vii

Citations of the Opinions and
Orders Entered In the Case xii

Jurisdictional Statement xii

Constitutional Provisions and
Statutes Involved In This Case xiii

Statement of the Case 1

Argument in Support of Allowance of the Writ 6

Question 1 regarding constitutional protections
for child under ICWA. 7

A. Substantive due process: Rights in
Domestic Security and Relationships
are Fundamental. 7
B. Equal Protection: Classification Based
on Genetics is Suspect. 10

Question 2 regarding applicability of
existing Indian family doctrine. 16

Question 3 regarding fair application of ICWA to facts presented. 19

Question 4 regarding Congressional authority under Indian Commerce Clause and violation of Tenth Amendment. 22

Conclusion 23

TABLE OF AUTHORITIES

CASES **PAGE**

United States:

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) ... 10
Bowers v. Hardwick, 478 U.S. 186 (1986) 15
Carey v. Population Servs. Int'l., 431 U.S. 678 (1977) 8
Delaware Tribal Bus. Comm.
v. Weeks, 430 U.S. 73 (1977) 14
Fisher v. District Court, 424 U.S. 382 (1976) 14
Gratz v. Bollinger, 123 S.Ct. 2411 (2003) 11, 12
Grutter v. Bollinger, 123 S.Ct. 2325 (2003) 6, 11, 12
In re Gault, 387 U.S. 1 (1967) 8
Lawrence v. Texas, 123 S.Ct. 2472 (2003) 15
Mississippi Band of Choctaw Indians
v. Holyfield, 490 U.S. 30 (1989) 14
Morton v. Mancari, 417 U.S. 535 (1974) 14
Santosky v. Kramer, 455 U.S. 745 (1982) 8
Schall v. Abrams, 467 U.S. 253 (1984)..... 23
Sherbert v. Verner, 374 U.S. 398 (1963) 9
Solid Waste Agency v.
Army Corps of Engineers, 531 U.S. 159 (2001) 22
Troxel v. Granville, 530 U.S. 57 (2000) 23
United States v. Holliday, 70 U.S. 407 (1865) 23
United States v. Lopez, 514 U.S. 549 (1995) 15, 22
United States. v. Morrison, 529 U.S. 598 (2000) 22
Washington v. Confederated Bands
and Tribes of Yakima, 439 U.S. 463 (1979) 14

Alabama

S.A. v. E.J.P., 571 So.2d 1187 (Ala. Ct. App. 1990) 16

Alaska

Matter of Adopt. T.N.F., 781 P.2d 973 (Alaska 1989) 18

Arizona
Michael J., Jr. v. Michael J., Sr.,
7 P.3d 960 (Ariz. Ct. App. 2000) 18

California
In re Bridget R., 49 Cal.Rptr.2d 507 (Cal. Ct. App. 1996) 16
In re Santos Y.,
112 Cal.Rptr. 692 (Cal. Ct. App. 2001) 7, 8, 13, 16

Georgia
Anderson v. Humble Oil & Ref. Co.,
174 S.E.2d 415 (Ga. 1970) 22

Idaho
Matter of Baby Boy Doe, 849 P.2d 925 (Idaho 1993) 18

Illinois
In re Armell, 550 N.E.2d 1060 (Ill. Ct. App. 1990) 20-21
In re Adoption of S.S., 657 N.E.2d 935 (Ill. 1995) 18

Indiana
Matter of Adoption of T.R.M.,
525 N.E.2d 298 (Ind. 1988) 17

Kansas
Matter of Adoption of Baby Boy L.,
643 P.2d 168 (Kan. 1982) 16, 17

Kentucky
Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996) 17

Louisiana
Hampton v. J.A.L, 658 So.2d 331 (La. Ct. App.1995) 17

Michigan
In re Elliott, 554 N.W.2d 32 (Mich. Ct. App. 1996) 18

Minnesota
In re Welfare of S.N.R.,
617 N.W.2d 77 (Minn. Ct. App. 2000) 18

Missouri
In Interest of S.A.M.,
703 S.W.2d 603 (Mo. Ct. App.1986) 17

Montana
Matter of T.S., 801 P.2d 77 (Mont. 1990) 20

Nebraska
In re Interest of C.W., 479 N.W.2d 105 (Neb. 1992) 19, 20

New Jersey
Matter of Adoption of a Child of Indian Heritage,
543 A.2d 925 (N.J.1988) 18

New York
In re Adoption of Baby Girl S., 690 N.Y.S.2d 907
(Surr. Ct., Westchester Cty. N.Y. 1999) 17

North Dakota
Baldock v. Workers Comp.,
554 N.W.2d 441 (N.D. 1996) 12, 13
Bergstrom v. Bergstrom,
296 N.W.2d 490 (N.D. 1980) 8
Hoff v. Berg, 595 N.W.2d 285 (N.D. 1999) 9
In the Interest of A.M. and C.M.,
601 N.W.2d 253 (N.D. 1999) 13

In the Interest of N.H. and B.H.,
632 N.W.2d 451 (N.D. 2001) 8

Oklahoma
Matter of S.C., 833 P.2d 1249 (Ok. 1992) 17

South Dakota
Matter of Adoption of Baade,
462 N.W.2d 485 (S.D.1990) 18
Matter of Dependency and Neglect of A.L.,
442 N.W.2d 233 (S.D. 1989) 19

Tennessee
In re Morgan, 1997 WL 716880
(Tenn. Ct. App. Nov. 19, 1997) 17

Utah
Interest of D.A.C., 933 P.2d 993 (Utah Ct. App. 1997) 18
Union Pac. R. Co. v. State Tax Comm'r,
429 P.2d 983 (Utah 1967) 22

Washington
Matter of Adoption of Crews,
825 P.2d 305 (Wash. 1992) 18

CONSTITUTIONAL PROVISIONS:

Const. Amends. V & XIV
(Equal Protection and Due Process Clauses) ..... passim
N.D. Const. art. I, § 1 9
N.D. Const. art. I, § 12 9
N.D. Const. art. I, §§ 21 & 22 13

STATUTES:

The Indian Child Welfare Act,
25 U.S.C. § 1901 et. seq. ..... passim
Adoption and Safe Families Act of 1997,
Pub. L. No. 105-89 (1997) 3, 12, 13, 16, 21
N.D.C.C. Ch. 14-13:
Interstate Child Placement Compact 3
N.D.C.C. Ch. 27-20:
Uniform Juvenile Court Act 3, 12, 16, 21

MISCELLANEOUS:

Black's Law Dictionary 269 (6th ed. 1990) 22

Laurence H. Tribe, American Constitutional Law,
§16-6, p.1451 (2d ed. 1988) 9

Guidelines for State Courts in Indian Child
Custody Proceedings, 44 Fed. Reg. 67584-67595,
Vol. 44, No. 228, Nov. 26, 1979 .....19, 20

CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

In the Interest of A.B., 2003 ND 98, 663 N.W.2d 625 (opinion filed June 17, 2003).

In the Interest of A.B., A Child, Civil No. 09-02-J-0282, (Memorandum Opinion and Order on Request for Review of Juvenile Court, October 25, 2002).

In the Interest of A.B., A Child, Court File No. 09-02-J-0282, (Findings of Fact, Conclusions of Law and Order of Judicial Referee, October 8, 2002).

JURISDICTIONAL STATEMENT

The order sought to be reviewed was entered by the Supreme Court of the State of North Dakota on June 17, 2003. The Supreme Court of the State of North Dakota entered an order denying the petition for rehearing in this matter on August 20, 2003. Rule 12.5 is not relied upon. The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review on a writ of certiorari the order in question is: 28 U.S.C. §1257. Notification required by Rule 29.4(b) has been made to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530-0001.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

U.S. Const. art. I, § 8, in pertinent part:

> The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

U.S. Const. amend. V, in pertinent part:

> No person shall be ... be deprived of life, liberty, or property, without due process of law ...[.]

U.S. Const. amend. X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the united States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.D. Const. art. I, § 1:

> All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing

and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

N.D. Const. art. I, § 12:

In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

N.D. Const. art. I, § 23.

The state of North Dakota is an inseparable part of the American union and the Constitution of the United States is the supreme law of the land.

The Indian Child Welfare Act, 25 U.S.C. 1901 et seq. (see appendix).

The Adoption and Safe Families Act of 1997 (Public Law 105-89) (adopted November 19, 1997) (amending Title IV of the Social Security Act, 42 U.S.C. 601 et seq.) (see appendix).

The Uniform Juvenile Court Act, N.D.C.C. ch. 27-20 (see appendix).

STATEMENT OF THE CASE[1]

The child, AB, is a female child having been born on May 1, 1993. AB's mother is KB, and her father is FB. KB is not an enrolled member of any federally recognized tribe. FB is an enrolled member of the Turtle Mountain Band of Chippewa (hereinafter Tribe). AB is either a member of or eligible for enrollment in the Tribe.

On March 3, 2001, AB, then age 7, came into protective custody of Cass County Social Services (hereinafter CCSS) due to her mother's early morning arrest on a DUI. KB subsequently advised police that her three children, then ages 7, 3, & 2, were home alone. On March 28, 2001, based upon the admission of KB and default of FB, AB was adjudicated deprived and was placed in the custody of CCSS for one year from March 28, 2001. The Tribe was notified of and had actual notice of AB's placement in foster care.

While there is conflicting information regarding where and with whom AB has lived for the first several years of her young life, AB clearly has had a tumultuous early childhood involving multiple care givers, instability, exposure to domestic violence in the home, chronic family violence and criminal activity, drug and alcohol use and abuse by care givers, physical and emotional neglect, and multiple parental absences due to their incarcerations.

In March 2001, CCSS made immediate relative placement

---

[1]The statement of the case is fairly comprised based on the record below and Petitioner refers the Court to the Orders issued by the state courts. In the Interest of A.B., 2003 ND 98, 663 N.W.2d 625 (opinion filed June 17, 2003), App. 1-20; In the Interest of A.B., A Child, Civil No. 09-02-J-0282, (Memorandum Opinion and Order on Request for Review of Juvenile Court, October 25, 2002), App. 21-30; and In the Interest of A.B., A Child, Court File No. 09-02-J-0282, (Findings of Fact, Conclusions of Law and Order of Judicial Referee, October 8, 2002), App. 31-37.

of AB with her paternal grandmother, HL. On October 15, 2001, HL contacted Norean Hoots, L.S.W., of CCSS, demanding that AB be removed from her home stating she couldn't deal with AB and wanted AB moved. AB was then placed by CCSS in a highly skilled, attentive, stable foster home and did very well in this setting, despite having many emotional, behavioral and academic needs.

On November 15, 2001, Ms. Hoots spoke with Marilyn Poitra, ICWA worker for the Tribe, and apprised Ms. Poitra of the developments of the case. Ms. Poitra then advised Ms. Hoots that the Tribe would not intervene and approved of AB's current placement. Throughout the course of AB's placement with CCSS, KB and FB made little effort or progress towards reunification with AB. On January 24, 2002, the permanency planning team approved recommendation to seek a termination of parental rights and refer AB for adoption. On or about February 4, 2002, KB's probation on an underlying Aggravated Assault conviction was revoked and she was sentenced to two years incarceration. KB has a significant criminal history for assaultive behavior, a history of domestic violence between KB and the fathers of her children, and a history of unresolved chemical dependancy issues.

On February 6, 2002, Ms. Hoots was told by Ms. Poitra that the Tribe now wanted AB placed back with HL. On February 20, 2002, the Tribe filed a motion for transfer of jurisdiction and to dismiss case. On March 5, 2002, a hearing was held on a Review of Custody issue as well as on the Tribe's transfer motion. KB, appearing with counsel, objected to Tribe's motion to transfer, which was effectively a veto to such transfer. 25 U.S.C. § 1911(b)(mandating state court transfer of jurisdiction to tribal court upon motion of tribe unless parent object or there exists good cause to the contrary). The Referee subsequently denied the Tribe's motion to transfer and extended custody of AB in CCSS for one year from March 5, 2002.

On or about June 3, 2002, CCSS filed a petition seeking a termination of parental rights (hereinafter TPR).[2] At that time, KB was incarcerated, had not addressed chemical dependence or violence issues and had allowed her brother, a convicted sex offender, to reside with her and her two other minor children (who at the time were wards of their father's tribe, the Three Affiliated Tribes). FB had had very little contact with the child since she had been placed with CCSS and placement of AB into the home of FB was not approved by the state of Washington, a requirement under the Interstate Child Placement Compact. See generally N.D.C.C. Ch. 14-13.

Upon the filing of the TPR petition, the Juvenile Court promptly issued a notice of right to intervene with all supporting documents to the Tribe and issued a scheduling order setting the arraignment for June 25, 2002, pretrial conference for July 30, 2002, and trial for August 7, 2002. The Tribe did not make an appearance or respond by the arraignment date, and did not file motions to intervene, to transfer jurisdiction, or to dismiss the case until July 23, 2002. CCSS did hurriedly file a brief in opposition to the Tribe's Motion for Transfer of Jurisdiction and to Dismiss on July 29, 2002, and filed a Supplemental Brief in Opposition to Tribe's Motion to Transfer raising constitutional arguments on or about September 19, 2002.

---

[2]The county is mandated by state and federal law to file a petition seeking the termination of parental rights where a child has been in foster care for a specified period of time. See N.D.C.C. § 27-20-20.1 ("a petition for termination of parental rights must be filed ...[i]f the child has been in foster care... for at least four hundred fifty out of the previous six hundred sixty nights"); see also Adoption and Safe Families Act, Pub. Law. 105-89, Sec. 103 (codified at 42 U.S.C. § 675(5)) ("in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months ... the State shall file a petition to terminate the parental rights of the child's parents").

At the pretrial hearing on July 30, 2002, the transfer issue could not be fairly addressed due to the Tribe's inadequate notice of motion, and the resulting lack of opportunity for non-movant's, including KB's counsel and the guardian ad litem, to prepare a response; thus, hearing on the motion to transfer was delayed and the trial date indefinitely postponed. Briefing in support of Transfer of Jurisdiction from KB and the Tribe was not filed until August 19, 2002, and August 22, 2002, respectively, and at the Tribes's request, the Juvenile Court again delayed hearing on the motion to transfer until September 23, 2002. In the interim, the Tribe had interposed a motion to exclude evidence of best interests of the child to which CCSS responded.

At the September 23, 2002, hearing, the Referee granted the Tribe's motion to exclude evidence related to the best interests of the child. The Referee heard legal arguments on the multiple issues briefed by the parties, including the constitutional issues raised by CCSS. The parties who had not briefed the constitutional issues were not prohibited from supplementing the record with written materials on those issues; however, the Referee did state that she would not rely on the constitutional issues in her decision.

Subsequently, the Referee denied the Tribe's Motion to Transfer Jurisdiction and Dismiss Case for good cause as allowed by 25 U.S.C. § 1911. The Referee concluded that AB's connection to the Tribe was "merely genetic," presumably applying at least in part the existing Indian family doctrine; that the Tribe's Motion was untimely under the totality of the circumstances including that the Tribe had knowledge of the events and proceedings in the case for over 16 months, that its motion had caused further delay in the proceedings, and that the state Court jurisdiction/forum was most appropriate.

The Tribe filed a Request for Review of Referee's Decision to the Juvenile Court. By Order dated October 25, 2002, filed

October 28, 2002, the Juvenile Court Judge reversed the Referee's decision, granted the Tribe's Motion to Transfer, and dismissed the case. The Juvenile Court Judge opined that the Referee refused to consider the constitutional arguments and that she was consequently precluded from considering the constitutional arguments.

By ruling issued June 17, 2003, the North Dakota Supreme Court held, *inter alia*, (1) that the Tribe's motion to transfer jurisdiction was not untimely, (2) that because the Tribal Court offered to sit in Fargo for proceedings it was not an inconvenient forum, (3) that best interests of the child is not a consideration for the threshold determination of whether there is good cause not to transfer jurisdiction to a tribal court, (4) rejected CCSS' position that strict scrutiny should be applied[3] when examining AB's rights to equal protection and due process under the State and Federal Constitutions, and (5) that ICWA is a rational exercise of Congressional power under the Indian Commerce Clause powers and that congress did not violate the Tenth Amendment of the United States Constitution. Although raised by Petitioner, none of the lower courts addressed the effect of KB's March 2002 veto of transfer of jurisdiction to the Tribal Court upon the Tribe's July 2002 motion for transfer.

This case is before the Court on a threshold issue regarding jurisdiction, that is, whether this termination of parental rights case should have proceeded before the State Juvenile Court in Cass County. It is Petitioners' position that the manner in which ICWA was applied here was not a legal application of

---

[3]The North Dakota Supreme Court opinion reflects that CCSS argued that ICWA served no compelling governmental interest: this is inaccurate. CCSS argued that even assuming ICWA served a compelling governmental interest, that the statute was not sufficiently narrowly tailored to promote that interest.

ICWA and/or the application of ICWA here violated the child's right to due process, both procedural and substantive, and her right to equal protection of and under state and federal child protection laws.

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT

This Petition for a Writ of Certiorari should be granted because a state court of last resort has (1) decided an important federal question in a way that conflicts with other state court's of last resort,[4] (2) a state court has decided an important question of federal law that has not been, but should be settled by this Court,[5] and (3) a state court has decided an important federal question in a way that conflicts with relevant decisions of the Court.[6]

---

[4]There is a conflict between the state courts whether the existing Indian Family doctrine is an appropriate application of Congressional policy and/or constitutional application of ICWA or an inappropriate judicially created exception to plain language of ICWA. Discussed infra. There is also a conflict between the state courts whether best interests of the child are properly considered by a court when deciding a transfer motion.

[5]The North Dakota Supreme Court has decided an important question of federal law by holding that ICWA is a proper exercise by Congress of the powers granted under the Indian Commerce Clause and not violative of the Tenth Amendment. Discussed infra. Further, the North Dakota Supreme Court has applied rational basis of review to an equal protection issue; the proper level of scrutiny is an important question of federal law. Discussed infra.

[6]The North Dakota Supreme Court's application of rational review to the equal protection issue conflicts with relevant decisions of the United States Supreme Court. The United States Supreme Court has applied strict scrutiny when examining equal protection issues raised by or for Indians as individuals. E.g., Grutter v. Bollinger, 123 S.Ct. 2325 (2003).

1. **Whether AB, a citizen of the United States, a resident of the State of North Dakota, and an Indian child as that phrase is defined under ICWA, is entitled to the protections of the Constitution of the United States of America and the Constitution of the State of North Dakota and thus entitled to due process and equal protection afforded other children under relevant federal and state laws concerning the protection of children and whether review of the application of ICWA to an individual Indian child is subject to strict scrutiny under both equal protection and substantive due process analyses, thus the means employed must be narrowly tailored to meet a compelling governmental interest especially where the matter involves government action vis a vis an individual child rather than the government action vis a vis a tribe.**

AB is not only an "Indian child" as that term is defined by the ICWA, but she is a citizen of the State of North Dakota and the United States of America, and thus entitled to the protections of the federal and state constitutions, including substantive due process and equal protection. In promulgating the Indian Child Welfare Act, Congress declared that it was its policy to serve the best interests of Indian children, and promote the stability and security of Indian families and tribes. 25 U.S.C. § 1902. However, the interests of Indian children, families and tribes are often in tension. In re Santos Y., 112 Cal.Rptr.2d 692, 715 (Cal. Ct. App. 2001).

A. Substantive Due Process: Rights in Domestic Security and Relationships are Fundamental.

Constitutional principles govern family rights, and children themselves hold fundamental rights and interests in family

relationships which are of constitutional dimension and which do not necessarily depend on the existence of a biological relationship. In re Santos Y., 112 Cal.Rptr.2d at 718. A child's constitutionally protected interests can under certain circumstances outweigh those of the biological parents, and can also under certain circumstances outweigh statutorily created interests of a Tribe. See id. ICWA must yield to a child's fundamental constitutional right to a stable and secure placement.

Family rights are recognized as fundamental and enjoy substantive due process / strict scrutiny analysis under the Constitution of the United States. E.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982) (noting that matters of family life are fundamental liberty interests protected by the Fourteenth Amendment). The United States Supreme Court has also recognized that children enjoy constitutional protections as well as adults. In re Gault, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"); Carey v. Population Servs. Int'l., 431 U.S. 678, 692 (1977) ("minors, as well as adults, are protected by the constitution and possess constitutional rights"). Similarly, the North Dakota Supreme Court has recognized that children enjoy constitutional protections. Bergstrom v. Bergstrom, 296 N.W.2d 490, 495 (N.D. 1980). The North Dakota Supreme Court has also noted that while "[t]he natural rights of parents to their children are fundamental and are constitutionally protected," parental "rights are not absolute or unconditional, and parents must provide care that satisfies minimum community standards," and a "child's health and safety are the paramount concern." In the Interest of N.H. and B.H., 2001 ND 143, ¶17; 632 N.W.2d 451. Children have a fundamental right to stable and permanent placement. In re Santos, 112 Cal.Rptr.2d at 725 (commenting that a child has a constitutional right to a reasonable directed early life, unmarked

by unnecessary and excessive shifts in custody). AB is entitled for this Court to address whether or not her constitutional rights outweigh the tribe's statutory rights here.

Further, domestic and familial relations are recognized as fundamental right subject to substantive due process analysis and strict scrutiny under both the federal and North Dakota constitutions. The pursuit of happiness guaranteed by N.D. Const. art. I, § 1, includes "the right to enjoy the domestic relations and the privileges of the family . . . without restriction or obstruction . . . except in so far as may be necessary to secure the equal rights of others," which is protected by the due process clause of N.D. Const. art. I, § 12. Hoff v. Berg, 1999 ND 115, ¶15; 595 N.W.2d 285. The North Dakota Supreme Court has in the past employed strict scrutiny when analyzing statutory intrusions on familial fundamental rights. Id. at ¶16. "[T]he idea of strict scrutiny acknowledges that [] political choices . . . burdening fundamental rights . . . must be subjected to close analysis in order to preserve substantive values of equality and liberty." Id. (quoting Laurence H. Tribe, American Constitutional Law, §16-6, p.1451 (2d ed. 1988)). Here, the North Dakota Supreme failed to even acknowledge AB's fundamental interest at issue, let alone apply a strict scrutiny to her case. Legislation which substantially interferes with the enjoyment of a fundamental right is subject to strict scrutiny, and must be set aside or limited unless it serves a compelling purposed and is necessary to the accomplishment of the purpose. Sherbert v. Verner, 374 U.S. 398 (1963).

A primary issue then is whether Tribal interests which the ICWA purports to promote are compelling under substantive due process standards to justify the impact implementation of ICWA would have on the child's constitutionally protected fundamental right to stable and permanent placement and, if so, whether the application of ICWA, under the facts here, is sufficiently narrowly tailored to further that interest. Assuming

Tribal interests which ICWA purports to promote are compelling, it is CCSS's position that the Tribal interest in self-preservation is not served by disrupting the bonds and security established by an individual child while in foster care for over 16 months. A child's fundamental right to remain where she has been safe and secure for a substantial period of time outweighs the late assertion and exercise of Tribal interest which would expose the child to renewed instability, uncertainty and insecurity in placement and relationships. In this case, the North Dakota Supreme Court failed to acknowledge or address the substantive due process issues raised.

B. Equal Protection: Classification Based on Genetics is Suspect.

Legislation concerning a "suspect" classification involving an immutable characteristic, such as race, ethnicity or ancestry, is subjected to strict scrutiny by the courts, and legislation is upheld only if its classification is precisely tailored to further a compelling governmental interest. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by reviewing court under strict scrutiny). In Adarand Constructors, Inc. v. Pena, the United States Supreme Court found that benign race-based presumptions, even those favorable to minorities, were still subject to strict scrutiny. Id. Since ICWA is triggered by genetic association, whether characterized as racial, ethnic, ancestry or blood quantum, strict scrutiny analysis is invoked to determine whether the classification serves a compelling governmental interest and is narrowly tailored to achieve that interest.

The North Dakota Supreme Court rejected CCSS'

assertion that the compelling interest standard applies to its constitutional challenges to ICWA. App. 18. However, equal protection applies to individuals, not groups, and all government action related to race is subject to strict scrutiny. See Grutter v. Bollinger, 123 S.Ct. 2325, 2337-38 (2003) (commenting that equal protection analysis "protects *persons*, not *groups*, [thus] all governmental action based on race ... should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed") (emphasis in original) (citation omitted). The United States Supreme Court has very recently applied strict scrutiny to an equal protection issue involving special treatment of Indians, among other minority groups, and did not distinguish the Indian minority and apply a rational basis test to that sub-group. See id. (applying strict scrutiny to equal protection challenge to law school admission policy which reflect commitment to racial and ethnic diversity with specific reference to Native Americans, among other groups); see also Gratz v. Bollinger, 123 S.Ct. 2411 (2003) (applying strict scrutiny to equal protection challenge to undergraduate admissions guidelines which considered race as a factor with specific reference to Native Americans, among other groups).

In Grutter, the Supreme Court emphasized that "all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny ... [which] means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. Grutter v. Bollinger, 123 S.Ct. at 2337-38. The Supreme Court went on to note that strict scrutiny review did not necessarily lead to invalidating the use of race as a factor, but emphasized rather that the narrow-tailoring requirement must be satisfied. Id. at 2338. The Court in Grutter held that the Law School has a compelling interest in attaining a diverse student body, id. at 2339, and that the admission policy at issue was sufficiently

narrowly tailored to meet that compelling interest, id. at 2347. (noting the Law School's "highly individualized, holistic review of each applicant's file"). In Gratz, the Supreme Court found the undergraduate admissions guidelines were not sufficiently narrowly tailored to survive strict scrutiny under equal protection analysis. Gratz v. Bollinger, 123 S.Ct. 2411, 2427-28 (where policy automatically distributed one-fifth of the points needed to guarantee admission to every single under represented minority applicant, including Native Americans, solely because of race). The Supreme Court opinions in Gratz and Grutter support a "highly individualized, holistic review" here of how ICWA, the Adoption and Safe Families Act, and the Uniform Juvenile Court Act, codified at Chapter 27-20 of the North Dakota Century code, shall apply and interact with respect to the individual child, AB, whose connection with the Tribe is primarily genetic.

Again, assuming that the governmental interest underlying ICWA is compelling, ICWA is not sufficiently narrowly tailored to achieve the interest of Tribal preservation or promotion. There is no evidence on the record that the application of ICWA actually leads to Tribal preservation or promotion, especially where the parents of the child to which the Act is being applied are not enmeshed in the Tribal community which is asserting standing. Here, the mother is not herself enrolled in any federally recognized tribe, had previously objected to tribal involvement, and is unavailable to provide for the child. The father has spent most of the child's life half a continent away from Tribal lands, has maintained very little contact with the child and has effectively abandoned the child.

The Equal Protection Clause of the United State's Constitution forbids the government from treating differently persons who are in all relevant respects alike. Baldock v. Workers Comp., 554 N.W.2d 441, 444 (N.D. 1996) (citation

omitted). Article I, Sections 21 and 22, of the North Dakota Constitution provides the North Dakota state constitutional guarantee of equal protection, and "do not prohibit legislative classifications or mandate identical treatment of different categories of persons but, rather, subject legislative classifications to different standards of scrutiny, depending upon the right that may be infringed by the challenged classification." Baldock v. Workers Comp., 554 N.W.2d 441, 444 (N.D. 1996) (citation omitted). The North Dakota Supreme Court applies "strict scrutiny to an inherently suspect classification or infringement of a fundamental right and strike down the challenged statutory classification unless it is shown that the statute promotes a compelling governmental interest and that the distinctions drawn by the law are necessary to further its purpose.'" Baldock, 554 N.W.2d at 444 (internal quotation omitted). Application of the ICWA to a child whose connection with an Indian tribe is primarily genetic does not serve the purpose for which the ICWA was enacted, i.e., "to protect the bests interests of Indian children and to promote the stability and security of Indian tribes and families." In re Santos Y., 112 Cal.Rptr. at 731; 25 U.S.C. § 1902.

The primary purpose of the North Dakota statutes relating to deprivation proceedings and terminations of parental rights is to protect the welfare of children. In the Interest of A.M. and C.M., 1999 ND 195, ¶ 6, 601 N.W.2d 253, 255 (N.D. 1999); see also generally N.D.C.C. Ch. 27-20, App. 93-151. Federal statutes address deprivation and termination proceedings as well. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89 (1997) (amending various sections of Title 42 of the United States Code), App. 59-92. The application of the ICWA to AB deprives her of equal protection of these state and federal statutes. The ICWA requires the Court to treat Indian children differently from non-Indian children. Blind application of ICWA, coupled with excessive delay and/or failure of the Tribe

to proffer appropriate placement options for the child, increases the likelihood that an Indian child's placement will be disrupted and permanence delayed. The only basis for applying ICWA here, rather than purely state law, is the child's genetic heritage. For example, if the child was domiciled on the reservation, then not only would it have been quite unlikely the child would have ever come into the sites of CCSS, but the state courts would not have had jurisdiction of the matter in the first instance. See 25 U.S.C. § 1911 (tribe has exclusive jurisdiction of child custody proceeding involving an Indian child residing or domiciled on the reservation); Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (same).

The cases relied upon by the North Dakota Supreme Court to reject the assertion that individual Indians are entitled to strict scrutiny/equal protection analysis are not focused on application of federal and/or state laws on individual Indians, but rather on more global tribal concerns. E.g., Washington v. Confederated Bands and Tribes of Yakima, 439 U.S. 463, 500-501(1979) (examining relationship of tribe vis a vis state); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84-85 (1977) (addressing entitlement to distribution from federal government and noting that plenary power of Congress in matters of Indian affairs does not mean that all federal legislation concerning Indians is immune from judicial scrutiny); Fisher v. District Court, 424 U.S. 382 (1976) (examining relation of tribal members vis a vis tribe and finding that the tribal court had exclusive jurisdiction in adoption matter); Morton v. Mancari, 417 U.S. 535, 554 (1974) (examining employment criterion promoting Indian self government and limiting finding to facts of case). These cases do not stand for the premise that individual Indians are not entitled to equal protection of state and federal laws, and thus strict scrutiny review of application of those laws to their

individual circumstances.

Furthermore, recent opinions of the United States Supreme Court appear to strengthen individual rights vis a vis governmental intrusion, e.g., Lawrence v. Texas, 123 S.Ct. 2472 (June 26, 2003) (holding Texas statute making it a crime for two consenting adult males to engage in sexual relation in the privacy of a home unconstitutional), and states' rights vis a vis Congressional intrusion, United States v. Lopez, 514 U.S. 549, 567 (1995) (Gun-Free School Zones Act exceeded Congress' commerce clause authority, since possession of gun in local school zone was not economic activity that substantially affected interstate commerce). Further, the Supreme Court has recognized it own fallibility. In Lawrence v. Texas, the Supreme Court recently discussed the doctrine of stare decisis noting that the doctrine is not an "inexorable command." 123 S.Ct. 2472, 2483 (citation omitted) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986), and declaring criminal sodomy statute unconstitutional as applied to consenting adults of the same sex). When laws once thought "necessary and proper" are later determined to "serve only to oppress," they are properly struck down. Lawrence v. Texas, 123 S.Ct. at 2484 ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."). To the extent that prior decisions of the United States Supreme Court ignore necessity of applying strict scrutiny to equal protection issues and/or substantive due process issues relating to Indians as individuals, the Court should revisit the same.

The North Dakota Supreme Court did not appropriately scrutinize the manner in which ICWA was applied to AB in light of her status as a citizen entitled to due process and equal protection. The child AB, as a citizen of the United States of America and the State of North Dakota, is entitled to the protection afforded children under all relevant state and federal

child protection laws, (i.e., the Adoption and Safe Families Act of 1997 and the Uniform Juvenile Court Act as enacted by North Dakota), the same as any other child in her position is so entitled to protection. The appropriate level of scrutiny to be applied by the courts is strict scrutiny under both an equal protection analysis and substantive due process analysis under both the federal and state constitutions.

2. Whether the existing Indian family doctrine should be applied here to prevent unconstitutional application of ICWA to the facts of this case.

Some courts have applied an analysis known as the "existing Indian family doctrine" and subsequently have not applied ICWA where a child is not being removed from an existing Indian family. See Matter of Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982). The doctrine is based on the premise that ICWA should not be applied where its purpose, i.e., the improper removal of Indian children from their Indian families, would not be served. Some courts apply the doctrine as an exception to the applicability of ICWA unless the child's biological parent or parents are not only of Indian descent, but also maintain a significant social, cultural or political relationship with their tribe. See, e.g., In re Bridget R., 49 Cal.Rptr.2d 507 (Cal. Ct. App. 1996). State courts do conflict with regard to the applicability of the existing Indian family doctrine, with some courts finding that the purposes of ICWA cannot be achieved by applying ICWA where there is little more than genetic connection with the tribe,[7] and with other

---

[7] S.A. v. E.J.P., 571 So.2d 1187 (Ala. Ct..App..1990) (determining the rationale behind the existing Indian family doctrine persuasive and supported by legislative history); In re Santos Y., 112 Cal.Rptr.2d 692 (Cal. Ct. App. . 2001) (applying existing Indian family doctrine as constitutional

acceptable application of ICWA); Matter of Adoption of T.R.M., 525 N.E.2d 298) (Ind.1988) (questioning ICWA's constitutionality in general as violative of Tenth Amendment; not applying ICWA to the present case noting Congressional purpose and intent not satisfied); Matter of Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982) (noting that the "underlying thread that runs throughout" ICWA "is concerned with the removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family" and applying exception to uphold intent); Rye v. Weasel, 934 S.W.2d 257 (Ky.1996) (following the Supreme Court of Oklahoma as a leading states in developing the Existing Indian Family Doctrine, and agreeing that the doctrine "does not create an exception not contemplated by the legislature" but rather acknowledges that "preservation of the existing Indian family was an integral purpose of the ICWA from its inception"); Hampton v. J.A.L, 658 So.2d 331(La.Ct.App.1995) (reviewing jurisprudence of existing Indian family doctrine and concluding "that Congress intended the Act apply only in situations involving the removal of children from an existing Indian family and Indian environment" and noting conclusion bolstered by subsequent lack of Congressional amendment); In Interest of S.A.M., 703 S.W.2d 603 (Mo.App.1986) (applying existing Indian family doctrine and noting that relationship between child and complaining biological parent did not sufficiently constitute an Indian family); In re Adoption of Baby Girl S., 690 N.Y.S.2d 907 (Surr. Ct., Westchester Cty. 1999) (agreeing with Supreme Courts of Oklahoma and Kentucky, noting Congress's failure to enact the 1987 amendments which would have eliminated the existing Indian family doctrine can be interpreted as supporting its continued application, and applying existing Indian family doctrine; distinguishing characterization of the existing Indian family doctrine as a judicially created exception contrary to the plain language of the ICWA and concluding that the application of the ICWA would not further the policies behind it or be in the best interests of the child in the case); Matter of S.C., 833 P.2d 1249 (Ok.1992) (discussing the existing Indian family doctrine, disagreeing that doctrine creates an exception not contemplated by the legislature, but rather noting that preservation of an existing Indian family was an integral purpose of the ICWA and noting that interpretation is supported by Congress failing to amend in light of awareness of this interpretation); In re Morgan, 1997 WL 716880 (Tenn. Ct. App. . Nov. 19, 1997) (acknowledging wariness of state court created exception to a federal statute, but noting necessity of interpreting any statute, federal or state, mindful of its purpose, and concluding existing Indian

courts finding that the doctrine is an impermissible judicially created exception to the Act itself.[8] It appears to Petitioner that the existing Indian family doctrine is also entwined in the constitutional analysis, to the extent that if the purposes of the Act are not met by its application in a given circumstance, then the Act is not sufficiently narrowly tailored to meet a compelling governmental interest.

In its opinion regarding AB, the North Dakota Supreme Court announced that "[t]he judicial adoption of an exception to ICWA would thwart a tribe's interest in its Indian children and ignore the plain language of ICWA, which does not require an Indian child to be part of an existing Indian family or the family to be involved with the tribe." App. 18. However, upon careful examination, one discerns that application of the existing Indian family doctrine is not a court's simplistic effort to ignore plain language of, or thwart application of, ICWA; but rather a purposeful application of ICWA in a constitutionally sound manner, i.e., finding that broad application of ICWA is not always appropriate and recognizing that ICWA is not sufficiently narrowly tailored to constitutionally be applied in some circumstances. Promotion

---

family doctrine sound); Matter of Adoption of Crews, 825 P.2d 305 (Wash. 1992) (applying existing Indian family doctrine and noting the while child may meet definition of "Indian child" noting ICWA inapplicable when Indian child not being removed from existing Indian environments).

[8]Matter of Adoption of T.N.F., 781 P.2d 973) (Alaska 1989) (rejecting the existing Indian family doctrine; Michael J., Jr. v. Michael J., Sr., 7 P.3d 960 (Ariz. Ct. App. .2000) (same); Matter of Baby Boy Doe, 849 P.2d 925 (Idaho 1993) (same); In re Adoption of S.S., 657 N.E.2d 935 (Ill. 1995) (same); In re Elliott, 554 N.W.2d 32 (Mich. Ct. App. . 1996) (same); In re Welfare of S.N.R., 617 N.W.2d 77 (Minn. Ct. App. .2000) (same); Matter of Adoption of a Child of Indian Heritage,543 A.2d 925 (N.J.1988) (same); Matter of Adoption of Baade, 462 N.W.2d 485 (S.D.1990) (same); Interest of D.A.C., 933 P.2d 993 (Utah Ct. App. .1997) (same).

of tribal interests under ICWA and the Constitution can coexist, but only when the application ICWA can be accomplished without treading unconstitutionally on competing interests, such as those of the individual child. The doctrine recognizes that where the child and/or child's family are not connected socially, culturally or politically to the tribe, then the goal of ICWA, to promote and sustain the tribe, can not be constitutionally achieved by subjecting a stranger child to tribal court jurisdiction.

3. **Whether under fair application of ICWA to the facts of this case the Tribe's motion to transfer jurisdiction should have been denied because (a) the mother's prior veto of the Tribe's initial motion to transfer jurisdiction barred subsequent motion to transfer jurisdiction, (b) the motion was untimely, (c) the Tribal Court is an inconvenient forum, and/or (d) the best interests of the child should have been considered by the State courts.**

A likely cause of difficulty in the application of ICWA in a fair, consistent, and constitutional manner is that there are no binding federal regulations promulgated to put the promises and goals of the Act into smooth practice and facilitate the application of the Act to specific cases with fair consideration and balancing of the individual rights of the children directly affected by ICWA's application. For guidance, courts and practitioners can and do look to non-binding guidelines published by the Bureau of Indian Affairs. E.g., In re Interest of C.W., 479 N.W.2d 105, 112-113 (Neb. 1992) (citing Guidelines for State Courts in Indian Child Custody Proceedings, 44 Fed. Reg. 67584-67595, Vol. 44, No. 228, Nov. 26, 1979 (hereinafter BIA Guidelines); see also Matter of Dependency and Neglect of A.L., 442 N.W.2d 233 (S.D. 1989)

(BIA Guidelines on what constitutes "good cause" for refusal to transfer proceeding on termination of parental rights to jurisdiction of tribe are not binding and are interpretative, rather than legislative). Nonetheless, as has been seen in this case, there are no specified parameters within which the Tribes' must respond or act, and issues of timeliness of response, intervention, petition for transfer of jurisdiction, waiver, laches, forum non conveniens, effect of veto on subsequent motion for transfer, etc., are left to the state courts to determine on a case by case basis.

Here, CCSS did raise pertinent arguments with regard to the fair application of the ICWA to the circumstances here, and the Juvenile Referee, who had shepherded the case for approximately 16 months at the time the TPR was filed, who was best situated to make the decision regarding the fair application of ICWA to the case at hand, did indeed agree with CCSS the transfer to the Tribe was not appropriate. App. 31-37. The Juvenile Court and North Dakota Supreme Court, with little development of the facts of the case, took a much more conservative, pure-comity minded approach with regard to what if anything could or should be expected from the Tribe. The Juvenile Court and North Dakota Supreme Court did not place any level of responsibility on the Tribe had to act in a timely manner or in a manner consistent with the child's best interests.[9]

---

[9]The Juvenile Referee granted the Tribes' motion to exclude evidence with regard to the best interests of the child. The Juvenile Court and North Dakota Supreme Court agreed on this issue. It is Petitioner's postiion that the child's best interests are of paramount concern to any court dealing with a child's custody and life circumstances. There is a conflict among state courts which have addressed the issue. Compare e.g., In re Interest of C.W., 479 N.W.2d 105 (Neb. 1992) (a child's bests interest may override tribal or family interests); and Matter of T.S., 801 P.2d 77 (Mont. 1990) (best interest of child is a proper factor considered) with In re Armell,

Cass County, the county in which the child had been in protective custody for over 16 months at the initiation of the TPR proceeding, was the most appropriate venue for the TPR action as most all information pertinent and relevant to the petition was situated in the County of Cass.[10] The Tribe's motion was untimely, whether the relevant time period is triggered on the date the child entered protective custody or on the date the TPR petition itself is filed, as the motion at issue here made was made on the eve of trial and after the child had been in care in Cass County for over 16 months.[11] It is Petitioner's further position that a motion for transfer of jurisdiction made by a tribe after a prior motion to transfer jurisdiction to the Tribe is vetoed by the mother is simply barred because to hold otherwise would indefinitely subject state court proceedings to collateral attack and create instability in the hoped for permanency of the child, a goal of another federal law, the Adoption and Safe Families Act (provisions also reflected in the Uniform Juvenile Court Act set out in Chapter 27-20 of the North Dakota Century Code).

---

550 N.E.2d 1060 (Ill. Ct. App. 1990) (child's best interest inapplicable regarding motion to transfer to tribal court).

[10]See fn 2, supra (explaining federal and state mandate that TPR petitions be filed when a child has been in foster care for a long time).

[11]ICWA provide no timeframe within which a tribe must respond after receiving notice to state court proceedings in order to preserve tribal rights under the Act. This is an affront to procedural due process. Cf. Fed.R.Civ.P. 12(a) (providing 20 days after being served with a summons and complaint for a defendant to answer and defend). The North Dakota Supreme Court did acknowlege that the Tribe delayed seven weeks after getting notice prior to filing the motion for transfer. App. 10.

4. Whether the United States Congress exceeded its authority under the Indian Commerce Clause and violated the Tenth Amendment of the United States Constitution in enacting ICWA.

A substantial nexus must exist between Congress' exercise of an enumerated power and the activity regulated by that exercise and when Congress exceeds its authority to act, the United States Supreme Court will invalidate such legislation. See, e.g., Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001) (holding enactment of Migratory Bird Act exceeded congressional power under the interstate commerce clause); United States v. Morrison, 529 U.S. 598 (2000) (striking civil remedy provision of the Violence Against Women Act as beyond congressional power under the interstate commerce clause); United States v. Lopez, 514 U.S. 549, 567 (1995) (Gun-Free School Zones Act exceeded Congress' commerce clause authority, since possession of gun in local school zone was not economic activity that substantially affected interstate commerce). It is CCSS's position that no substantial nexus exists between the Indian commerce clause and ICWA.

Commerce has been defined as the "exchange of goods, productions, or property of any kind; the buying selling and exchanging of articles." Black's Law Dictionary 269 (6th ed. 1990) (citing Anderson v. Humble Oil & Ref. Co., 174 S.E.2d 415 (Ga. 1970)). The definition of commerce has also included "transportation of persons and property by land, water and air." Id. (citing Union Pac. R. Co. v. State Tax Comm'r, 429 P.2d 983 (Utah 1967)). Commerce with Indian tribes has been defined by the Court as "commerce with individuals belonging to such tribes, in the nature of buying, selling, and exchanging commodities, without reference to the locality where carried on, though it be within the limits of a state." Id. (citing United

States v. Holliday, 70 U.S. 407, 3 Wall. 407, 18 L.Ed. 182 (1865)). Children are not goods, chattel or property. Children are not commodities to be bought, sold, or exchanged for money or other gain, including political capital. Children, including Indian children, are our most vulnerable individual citizens and necessarily entitled to protections provided under federal and state laws enacted for that very purpose.

The ICWA impermissibly intrudes on a power reserved to the states, that is, the care of deprived children. See Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J. Dissenting) (acknowledging State's long recognized interests as *parens patriae* and child's own interest in preserving relationships that serve child's welfare and protection) (citations omitted); see also Schall v. Abrams, 467 U.S. 253, 265 (1984) ("if parental control falters the state must play its part as *parens patriae*"). Congress overreached in enacting ICWA as there is no nexus, let alone a substantial nexus, between the protection of deprived children and commerce with Indian tribes; thus ICWA cannot stand.

CONCLUSION

For the reasons set out above, the petition for writ of certiorari to the Supreme Court of the State of North Dakota

should be granted.

Dated this 12th day of November, 2003.

Respectfully submitted,

SUSAN L. BAILEY
Assistant Cass County State's Attorney
Counsel of Record

CONSTANCE L. CLEVELAND
Assistant Cass County State's Attorney
Cass County Social Services
1010 - 2nd Avenue South
P.O. Box 3106
Fargo, ND 58108-3106
Tel: (701) 239-6797
Counsel for Petitioner
Norean Hoots, L.S.W.,
Cass County Social Services

And in all things joined by the undersigned, pursuant to Rule 12.4 of the Rules of the Supreme Court of the United States.

Dated this 12th day of November, 2003.

MONTY G. MERTZ
Attorney at Law
1308 - 23rd Street South
P.O. Box 10396
Fargo, ND 58106-0396
Tel: (701) 293-7788
Counsel and Guardian ad Litem for AB